No. 05-85

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IN THE

Supreme Court of the United States

POWEREX CORP.,
Petitioner,

v.

RELIANT ENERGY SERVICES, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PLAINTIFFS-RESPONDENTS

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction to review the district court's order, notwithstanding 28 U.S.C. § 1447(d).

2. Whether a corporate entity is an "organ of a foreign state" under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(b)(2), when the entity's principal function is to seek out profits through trading energy resources, its operations mirror those of a private market participant and are not actively supervised by the government, and its employees, who are not civil servants, are paid generous bonuses.

TABLE OF CONTENTS

	Page
COUNTER-STATEMENT OF QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	vii
COUNTER-STATEMENT OF THE CASE	1
The Underlying Litigation, and the Cross-Claims Against Powerex and Others	1
Powerex's Relationship with British Columbia	3
The District Court's Remand, the Court of Appeals' Acceptance of Jurisdiction, and Its Affirmance	4
SUMMARY OF ARGUMENT	8
ARGUMENT	9
I. Title 28 of United States Code Section 1447(d) Barred the Court of Appeals from Reviewing the Remand	9
A. The Jurisdictional Bar of Section 1447(d) Is Broad, and Judicial Exceptions Are Meant to Be Narrow	9
B. The District Court Remanded This Case for Lack of Subject Matter Jurisdiction Pursuant to Section 1447(c)	12
1. The District Court Said Numerous Times that It Was Remanding for Lack of Subject Matter Jurisdiction, Cited Section 1447(c), and Never Said Anything Different	12
2. Section 1447(d) Prohibits the Appellate Courts from Second-Guessing the Basis for a Remand	15

TABLE OF CONTENTS—Continued

Page

3. The District Court Ruled that It Had Not Obtained Subject Matter Jurisdiction Through the BPA/WAPA Removal Because of the Derivative Jurisdiction Doctrine and Because of Sovereign Immunity 17

4. The District Court Ruled that It Had Not Obtained Subject Matter Jurisdiction Through the BC Hydro Removal Because of BC Hydro's Immunity 19

5. The District Court Ruled that It Had Not Obtained Subject Matter Jurisdiction Through the Powerex Removal Because Powerex Is Not a "Foreign State" 20

C. The Bases upon Which the Ninth Circuit Accepted Jurisdiction Will Not Withstand Scrutiny 21

1. The FSIA Rulings Neither "Preceded" the Remand Nor Were They "Apart From" It 22

2. Calling the Rulings "Substantive" Makes No Difference 23

3. The Court's Authority to Decide Its Jurisdiction Does Not Constitute Subject Matter Jurisdiction 23

D. Powerex's Additional Arguments for Appellate Jurisdiction Are Mistaken 25

TABLE OF CONTENTS—Continued

	Page
1. The Remand Was Not of a Supplemental Claim	25
2. Subject Matter Jurisdiction Was Lacking from the Outset	26
3. Remands Under the FSIA Are Not Exempt from Section 1447(d)	28
E. There Was No Remand of a Supplemental Claim Here, But Had There Been, It Too Would Have Been Unappealable	31
II. The Lower Courts Correctly Concluded that Powerex Is Not an "Organ" of British Columbia	33
A. To Be Deemed an "Organ of a Foreign State," an Entity Must Serve a Particular Governmental Function Under Active Supervision by the State	33
B. Because Powerex Functions Like an Independent, for-Profit Private Enterprise, It Is Not an "Organ" of British Columbia	38
1. Powerex Was Created for the Expres Purpose of Maximizing Revenues—Typically a Private, Not Governmental, Function	38
2. Powerex Was Incorporated and, in Most Respects, Functions Like Any Privately-Held Corporation, with Only Superficial Oversight by the British Columbia Government	41

TABLE OF CONTENTS—Continued

Page

3. Powerex's Employees Share in Its Profits, Enjoy Bonuses and Are Not Civil Servants 44

4. Powerex Deals with BC Hydro at Arm's Length..... 45

C. The Ninth Circuit Carefully Weighed the Foregoing Factors and Properly Found Powerex's Evidence Wanting..... 47

D. The Foreign-Relations Concerns of Amici and Powerex Are Properly Addressed to Congress, Not This Court 49

CONCLUSION 50

APPENDIX 1a

TABLE OF AUTHORITIES

CASES — Page

Adkins v. Illinois Cent. R.R.,
326 F.3d 828 (7th Cir. 2003) 16
Aliota v. Graham,
984 F.2d 1350 (3d Cir. 1993) 30, 31
Angelides v. Baylor College of Medicine,
117 F.3d 833 (5th Cir. 1977) 18
Arbaugh v. Y&H Corp.,
546 U.S. 500, 126 S. Ct. 1235 (2006) 26
Archuleta v. Lacuesta,
131 F.3d 1359 (10th Cir. 1997) 16
Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989) 19
Barnaby v. Quintos,
410 F. Supp. 2d 142 (S.D.N.Y. 2005) 18
Board of Regents of the Univ. of Texas Sys. v. Nippon Tel. and Tel. Corp.,
No. 05-51432, 2007 WL 273957 (5th Cir. Feb. 1, 2007) 35, 40, 43, 45
Carnegie-Mellon Univ. v. Cohill,
484 U.S. 343 (1988) 31, 32
Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159 (1983) 49
Deal v. United States,
508 U.S. 129 (1993) 34
District of Columbia v. Merit Sys. Prot. Bd.,
762 F.2d 129 (D.C. Cir. 1985) 26
Edwards v. United States Dep't of Justice,
43 F.3d 312 (7th Cir. 1994) 18
Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.,
541 U.S. 246 (2004) 34

TABLE OF AUTHORITIES—Continued

Page

EOTT Energy Operating Ltd. P'ship v. Winterthur Swiss Ins. Co.,
257 F.3d 992 (9th Cir. 2001) 39
Exxon Co., U.S.A. v. Sofec, Inc.,
517 U.S. 830 (1996) 33
FDIC v. Meyer,
510 U.S. 471 (1994) 18
F. Hoffman-LaRoche Ltd. v. Empagran S.A.,
542 U.S. 155 (2004) 49-50
Federal Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba,
462 U.S. 611 (1983) 37, 41
Filler v. Hanvit Bank,
378 F.3d 213 (2d Cir.), *cert. denied*, 543 U.S. 1022 (2004)..... 35
Gaffney v. Cummings,
412 U.S. 735 (1973) 34
Gates v. Victor Fine Foods,
54 F.3d 1457 (9th Cir. 1995) 36, 42, 47
Graver Tank & Mfg. Co. v. Linde Air Prods., Co.,
336 U.S. 271 (1949) 33
Gravitt v. Southwestern Bell Tel. Co.,
430 U.S. 723 (1977) 11, 12, 23, 24
Hansen v. Blue Cross of California,
891 F.2d 1384 (9th Cir. 1989) 23
Heaton v. Monogram Credit Card Bank,
231 F.3d 994 (5th Cir. 2000) 14, 16
Hendricks v. Dynegy Power Mktg., Inc.,
160 F. Supp. 2d 1155 (S.D. Cal. 2001) 2
Herman Family Revocable Trust v. Teddy Bear,
254 F.3d 802 (9th Cir. 2001) 26
In re Elko County Grand Jury,
109 F.3d 554 (9th Cir. 1997) 18

TABLE OF AUTHORITIES—Continued

Page

In re Southwestern Bell Tel. Co.,
535 F.2d 859 (5th Cir. 1976) 11, 12
In re WTC Disaster Site,
414 F.3d 352 (2d Cir. 2005) 14
Iselin v. United States,
270 U.S. 245 (1926) 30
Kasi v. Angelone,
300 F.3d 487 (4th Cir. 2002) 18
Kelly v. Syria Shell Petroleum Dev. B.V.,
213 F.3d 841 (5th Cir. 2000) 35, 36, 38, 39
Kircher v. Putnam Funds Trust,
126 S. Ct. 2145 (2006) ..... *passim*
Kircher v. Putnam Funds Trust,
373 F.3d 847 (7th Cir. 2004) 23
Lambert Run Coal Co. v. Baltimore & O.R. Co.,
258 U.S. 377 (1922) 17
Linton v. Airbus Indus.,
30 F.3d 592 (5th Cir. 1994) 16, 20, 21, 27, 33
Mobil Corp. v. Abeille Gen. Ins. Co.,
984 F.2d 664 (5th Cir. 1993) 20
Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246 (1951) 34
Nolan v. Boeing Co.,
919 F.2d 1058 (5th Cir. 1990) 25
Osborn v. Haley,
127 S. Ct. 881 (2007) ..... *passim*
Pasquantino v. United States,
544 U.S. 349 (2005) 34
Patrickson v. Dole Food Co.,
251 F.3d 795 (9th Cir. 2001), *aff'd*, 538 U.S. 468 (2003) ..... *passim*
Peninsula Asset Mgmt. (Cayman) v. Hankook Tire Co.,
476 F.3d 140, 2007 WL 241294 (2d Cir. 2007) ... 35, 39

TABLE OF AUTHORITIES—Continued

Page

Quackenbush v. Allstate Ins. Co.,
517 U.S. 706 (1996) 32
Republic of Argentina v. Weltover, Inc.,
504 U.S. 607 (1992) 34
Security Pacific Nat'l Bank v. Derderian,
872 F.2d 281 (9th Cir. 1989) 19-20, 25
Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
332 F.3d 116 (2d Cir. 2003) 14, 23
Sykes v. Texas Air Corp.,
834 F.2d 488 (5th Cir. 1987) 10
Thermtron Prods., Inc. v. Hermansdorfer,
423 U.S. 336 (1976) 10, 12-13, 30-34
Things Remembered, Inc. v. Petrarca,
516 U.S. 124 (1995) 9, 10, 28, 31-33
USX Corp. v. Adriatic Ins. Co.,
345 F.3d 190 (3d Cir. 2003) ..... *passim*
Verlinden B.V. v. Central Bank of Nigeria,
461 U.S. 480 (1983) 19, 21-22, 25, 50
Waco v. United States Fid. & Guar. Co.,
293 U.S. 140 (1934) 2

STATUTES, RULES AND REGULATIONS

12 United States Code
§ 1441a(1)(3) 28
§ 1819(b)(2) 28
16 United States Code
§ 831 42
§ 832a 42, 50
25 United States Code
§ 487(d) 28

TABLE OF AUTHORITIES—Continued

	Page
26 United States Code	
§ 824	2
28 United States Code	
§ 1330(a)	19, 20
§ 1346(b)	5
§ 1346(b)(1)	17
§ 1367	25
§ 1367(a)	26
§ 1441	11, 17
§ 1441(d)	2, 24, 25
§ 1442	18
§ 1442(a)(1)	2
§ 1447(c)	*passim*
§ 1447(d)	7-16, 20, 23, 25
§ 1602	49
§ 1603(a)	2, 19, 33-34
§ 1603(b)(2)	5, 34, 36, 37
§ 1604	19
§ 1605	19, 30
§ 1605(a)(2)	5
§ 2679(d)(2)	29
36 United States Code	
§ 300101	42
42 United States Code	
§ 7152	42, 50
§ 7275	42, 50
Class Action Fairness Act, Pub. L. No. 109-2, § 5(a), 119 Stat. 4 (2005)	28-29
Judicial Improvement Act, Pub. L. 99-336, § 3, 100 Stat. 633 (1986)	17

TABLE OF AUTHORITIES—Continued

Page

Judicial Improvements and Access to Justice Act, Pub. L. 100-702, § 1016(c)(1), 102 Stat. 4670 (1988) 27

Twenty-First Century Department of Justice Appropriations Authorization Act, Pub. L. 107-273, § 11020(b)(3)(A), 116 Stat. 1758 (2002) 18

Federal Rules of Civil Procedure Rule 12(b)(1) 18

SECONDARY AUTHORITIES

House Report No. 94-1487, Cong. Record Vol. 122 (1976) 37, 50

Joseph W. Dellapenna, *Suing Foreign Governments and Their Corporations* (2d ed. 2003) 37

16 James Wm. Moore, *Moore's Federal Practice* § 107.44 (3d ed. 2006) 27

14B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction 3d* § 3721 (Supp. 2006) 18

14C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3727 (3d ed. 1998) 26

COUNTER-STATEMENT OF THE CASE

This matter does not have its origins in decades-old treaties concerning the Columbia River Basin. Rather, it begins with the energy crisis that rocked California in 2000–2001, a state court consumer class action that followed, and the efforts of certain domestic defendants to secure a federal forum by cross-claiming against foreign and federal agency parties, including Petitioner Powerex Corp. ("Powerex"), who then removed the case to federal court.

The Underlying Litigation, and the Cross-Claims Against Powerex and Others[1]

In 1996, California enacted legislation that created a sea change in the state's energy regulatory scheme. The new law shifted the state's electricity industry to a market-based system subject to few of the regulatory restraints that previously had controlled the industry. In the new regime, wholesale energy supply and prices were to be determined by competitive market forces. But that is not what happened. Instead of enhanced competition, electricity generation assets came to be concentrated primarily in five companies, including Reliant Energy Services, Inc. ("Reliant") and Duke Energy Trading and Marketing, LLC ("Duke"). The new system proved to be highly susceptible to manipulation. Freed of the constraints imposed by regulators, the generators and traders sold less electricity at inflated prices. This led to the energy crisis of 2000-2001, during which electricity costs more than quadrupled.

Beginning in November 2000, ratepayers filed several class actions against more than twenty electricity sellers and

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[1] The initial portions of the Counter-Statement of the Case regarding the underlying lawsuit are taken from allegations set forth in Plaintiffs' Master Complaint in *In re Wholesale Electricity Cases*, JCCP Nos. 4204, 4205. *See* Ex. 1 to Excerpts of Record of Appellee Powerex Corp., filed in *Reliant Energy Services, Inc. v. Powerex Corp.*, No. 03-55131 ("Reliant Appeal") (9th Cir. July 28, 2003) ("Pwx. ER"), at 0012–19.

traders, including Duke and Reliant. Plaintiffs alleged that Defendants engaged in anticompetitive conduct in California's energy market, thereby artificially inflating the price of electricity in the state, in violation of California's antitrust and consumer protection laws. Pwx. ER 0025-32.

Defendants removed these actions to federal court, asserting, *inter alia*, that they were "completely preempted" by the Federal Power Act, 26 U.S.C. § 824. The district court rejected their arguments, and remanded the cases. *See Hendricks v. Dynegy Power Mktg., Inc.*, 160 F. Supp. 2d 1155 (S.D. Cal. 2001). After remand, and just as discovery was to begin in earnest, Duke and Reliant engineered a second removal of these actions by filing cross-complaints against, among others, Bonneville Power Administration ("BPA"), Western Area Power Administration ("WAPA"), and two Canadian entities, Powerex and its corporate parent, BC Hydro and Power Corporation ("BC Hydro"). Pwx. ER 0044–86. Duke and Reliant alleged that the cross-defendants "engaged in the same conduct about which plaintiffs complain." *See Id.* at 0049, 0056, 0083.

The federal and Canadian cross-defendants filed removal petitions. Powerex and BC Hydro removed under 28 U.S.C. § 1441(d), asserting that they are "agenc[ies] or instrumentalit[ies] of a foreign state," as defined in the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(a) ("FSIA" or the "Act"). Pwx. ER 0094-95, 0098-99, 0103-104. BPA and WAPA based removal on their status as United States "agenc[ies]" or "officer[s]" under 28 U.S.C. § 1442(a)(1). Pwx. ER 0108.

Plaintiffs again sought remand. They asserted that the district court lacked subject matter jurisdiction because (1) BPA, WAPA and BC Hydro were immune from suit, and (2) Powerex was not entitled to sovereign status, and thus could not remove. Plaintiffs' Notice of Motion and Motion to Remand, filed in *Reliant Energy Servs., Inc. v. Arizona Elec. Power Corp.*, No. CV-02-0990-RHW (S.D. Cal. July 25,

2002). Reliant and Duke, as well as the new foreign and federal cross-defendants, opposed the remand motion.

Powerex's Relationship with British Columbia

In the district court, Powerex portrayed itself as an arm of the British Columbia government, apparently attempting to cloak itself with the acknowledged sovereign status of its parent, BC Hydro. It recited extensive historical background regarding the Columbia River Treaty, the creation of BC Hydro and BC Hydro's relationship to the Province. It does the same here. Pwx. Br. 3–9.

Little of this history, however, bears on what Powerex actually is and does. Powerex is a wholly-owned subsidiary of BC Hydro. It sells power for profit. Pet. App. 53a; JA 110, 201; Pwx. ER 0782–84. In form and function, it is a corporation; no enabling statute authorized its creation or prescribed its powers, rights and obligations. Its Articles of Incorporation are virtually indistinguishable from those of any privately-held company. JA 252–53; Pwx. ER 0236–60. Powerex's employees are not civil servants and do not receive civil servant salaries. JA 242, 245, 260. Indeed, they receive a portion of Powerex's profits through a "unique" bonus pool—a sum that has amounted to millions of dollars per year in recent years. JA 242, 245–46.

Powerex's daily trading activities are not subject to Provincial control, and the company has no regulatory authority itself. Pet. App. 30a; JA 260. Powerex is free to trade and market its energy resources as it sees fit, subject to the same regulatory constraints as any privately-held energy company. JA 257–58. When asked which companies he viewed as Powerex's competitors, Powerex's CEO identified several, including Duke—all but one are private companies. JA 252. Powerex asserts that it is subject to certain obligations and enjoys certain privileges as a government-related company. Yet, for all its supposed "public" attributes, it is not subject

to at least one significant legislative guarantee of public accountability—British Columbia's Freedom of Information and Protection of Privacy Act, ch. 165, R.S.B.C. 1996. *See* Appendix 1a, 4a-5a.

Although Powerex originally was intended to export British Columbia's surplus hydroelectricity, it later was selected as the assignee of the Province's rights and obligations under the Columbia River Treaty. JA 112. Other private companies submitted competing proposals to market this power in the United States, but Powerex prevailed. JA 253. Yet here again, Powerex operates independently, like a private company. Its dealings with BC Hydro and the Province are at arm's length. JA 141. In fact, the Province expressly disavowed any agency relationship between it and Powerex in the assignment agreement. JA 151.

Over the years, Powerex has continued to evolve from the limited-purpose entity created in 1988 into a significant player in the western North American energy markets. It trades and markets not only hydroelectric resources, but also natural gas. JA 249. Powerex has a broad portfolio of energy sources that include many private producers, and over seventy percent of the power it markets comes from United States sources, not the British Columbia government. JA 251–52.

The District Court's Remand, the Court of Appeals' Acceptance of Jurisdiction, and Its Affirmance

After conducting a hearing on the remand motion, the district court entered a detailed order remanding the cases for lack of subject matter jurisdiction. Pet. App. 18a–44a. No other basis for remand was discussed by the court or suggested in its order. Indeed, under the sole principal heading "Subject Matter Jurisdiction over the Removed Actions," the court began by noting that "plaintiffs argue that the Court lacks jurisdiction over the removed actions and, as

such, they must be remanded." *Id.* at 20a. The court also expressly recognized that Plaintiffs' remand motion "hinges . . . on the Court's jurisdictional authority to hear the removed claims." *Id.* at 20a.

Throughout its order, the district court focused on the parties' jurisdictional arguments. The court concluded that BPA and WAPA had not waived their sovereign status. *Id.* at 39a–40a. Furthermore, the cross-claims asserted against these entities fell under the exclusive jurisdiction of the federal courts. *See* 28 U.S.C. § 1346(b). Accordingly, "under the derivative jurisdiction doctrine, [the court] does not have jurisdiction over the cross-claims filed against the United States because the state court lacked jurisdiction to hear them in the first place." Pet. App. 41a–44a.

The district court observed that BC Hydro qualified as a foreign state under the FSIA, and that the "commercial activity" exception to sovereign immunity was not met. *Id.* at 21a–24a, 31a–33a. Additionally, the court concluded that BC Hydro could not be held liable through the activities of Powerex in the United States because Powerex operates independently, rather than on BC Hydro's behalf. Thus, Powerex was held not to be BC Hydro's agent under 28 U.S.C. § 1605(a)(2). Pet. App. 24a–31a. Consequently, BC Hydro was immune from suit and there was no federal subject matter jurisdiction created by the BC Hydro removal. *Id.* at 33a.

Finally, the district court held that Powerex is not an "agency or instrumentality of a foreign state," within the meaning of 28 U.S.C. § 1603(b)(2). The court first acknowledged the factors commonly analyzed by lower courts to determine whether an entity is an "organ" of a foreign state. Pet. App. 34a. It concluded that Powerex lacks certain key characteristics of an "organ," including that it has no regulatory authority, is not immune from suit and is not subject to active governmental oversight. *Id.* at 35a. Its

board of directors is not appointed directly by the Province. *Id.* at 35a, n.9. Its employees are not civil servants and are paid bonuses not otherwise available to government employees. *Id.* at 35a & n.9. At bottom, the district court concluded, "'"Powerex constitutes [an] 'independent commercial enterprise, heavily regulated, but acting to maximize profits rather than pursue public objectives.'" *Id.* at 36a (citations omitted).

Having concluded that it lacked subject matter jurisdiction over all the removed cross-claims, the court remanded the action to state court. *Id.* at 44a. BC Hydro and the federal agencies sought clarification that the court had, in fact, intended to dismiss the cross-claims against them, and Duke, Reliant and Powerex moved to stay the remand order pending appeal. The district court rejected both motions. It observed that a stay was not called for because remand orders based on 28 U.S.C. § 1447(c) normally are not appealable. JA 282. It pointed out that a "plain and common sense review of the Court's remand order shows that the Court only stated a § 1447(c) basis for remand"—namely, lack of subject matter jurisdiction. JA 283. Similarly, in response to the BC Hydro and federal agencies' plea for dismissal, the court held that since it "lacks subject matter jurisdiction over [the cross-claims], the appropriate procedure is to remand the claim[s] to state court, rather than dismiss the claim[s]" against the immune parties. JA 285; *see* JA 287–88.

On appeal, the Ninth Circuit initially questioned whether it had appellate jurisdiction, but preliminarily concluded that it did, and then stayed the remand order pending resolution of the appeals. Order, Reliant Appeal (9th Cir. Feb. 20, 2003). Plaintiffs moved for reconsideration regarding appellate jurisdiction, but the court of appeals denied that motion. Order, Reliant Appeal (9th Cir. Sept. 5, 2003).

Ultimately, after briefing and argument—and two years after the remand order—the court of appeals issued its

decision (1) adhering to its view that it had appellate jurisdiction, and (2) affirming the ruling that Powerex is not entitled to sovereign status. Pet. App. 1a–17a. As to jurisdiction, the court stated that, notwithstanding 28 U.S.C. § 1447(d), it had jurisdiction to review "substantive issues on the merits, apart from issues of jurisdictional or procedural defects leading to remand." Pet. App. 10a.

On the question of Powerex's status, the court of appeals acknowledged that the "organ" inquiry involves examination of a number of factors. *Id.* at 15a. The court noted that Powerex offered "some evidence that it serves a public purpose." *Id.* at 16a. It concluded, however, that this factor was outweighed by others, including Powerex's "high degree of independence" from the provincial government, and the "lack of financial support from the government." *Id.* It also observed that, as in *Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001), *aff'd*, 538 U.S. 468 (2003), Powerex was "not run by government appointees, was not staffed with civil servants, was not wholly owned by the government, was not immune from suit, and did not exercise any regulatory authority." Pet. App. 15a–16a. Finally, the court rejected Powerex's assertion that it is "owned" by British Columbia, noting that under *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003), only an entity whose shares are owned directly by the foreign state qualify as an "organ" under the FSIA.

The court of appeals also affirmed the district court's immunity rulings regarding BC Hydro, BPA and WAPA. However, it determined that the cross-claims against the federal agencies should have been dismissed, rather than remanded. Pet. App. 16a–17a. Those rulings are now final.

Powerex then petitioned for certiorari on both the "organ" and the "ownership" prongs of its claim for "foreign state" status. The Court granted certiorari as to the former only, and

also as to the court of appeals' jurisdiction to review the remand order.[2] JA 290.

SUMMARY OF ARGUMENT

The district court remanded this case to state court, pursuant to 28 U.S.C. § 1447(c), because it lacked subject matter jurisdiction. Consequently, there was no appellate jurisdiction. The bar of section 1447(d) applies to all appeals of remand orders, except in very limited situations, none of which is present here.

The bases for jurisdiction cited by the Ninth Circuit are contrary to the section 1447(d), jurisprudence, including the Court's opinion in *Kircher v. Putnam Funds Trust*, 126 S. Ct. 2145 (2006). *Kircher* makes clear that whether the district court makes "substantive" or other decisions in the course of concluding that it has no jurisdiction, no appeal lies from such a decision.

The additional arguments offered by Powerex and amici for appellate jurisdiction seek to recast the remand order as based on something other than section 1447(c), and thus outside the bar of section 1447(d). Again, *Kircher* teaches that when it is clear the district court intended to remand and believed that it was remanding under section 1447(c), neither second-guessing of the grounds for remand nor legal attacks on the correctness of the jurisdictional remand can create appellate jurisdiction where Congress has provided none.

Finally, this Court should reject Powerex's suggestion that it create an exception to section 1447(d) for all FSIA cases. Congress has provided statutory exceptions to section 1447(d), and that is not one of them.

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[2] The underlying litigation ultimately proceeded in state court after the Ninth Circuit's affirmance of the remand. Various Defendants settled, including Duke and Reliant, and the remaining Defendants obtained a dismissal on demurrer. Not all of those dispositions are final at this time.

If the Court finds appellate jurisdiction, it should affirm the Ninth Circuit's decision that Powerex is not an "organ of a foreign state" under the FSIA. The lower courts consistently have held that "organ" status requires that the entity in question demonstrate, at a minimum, that (1) it principally performs a government function, and (2) does so at the direction of, and under the active supervision of, the foreign state. *See, e.g., USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 206–07, 209 (3d Cir. 2003); *Patrickson*, 251 F.3d at 807–08; *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 846–47 (5th Cir. 2000). Powerex cannot meet this test.

The district court and court of appeals carefully considered all the evidence submitted by the parties. Both courts concluded that, on balance, any "public" attributes Powerex may have are far outweighed by its essentially private purpose and function, and its independence from active governmental oversight. The factual findings of these courts were amply supported by the evidence, and the courts properly applied the law to those facts. This Court should not revisit those fact-specific rulings. *See Graver Tank & Mfg. Co. v. Linde Air Prods., Co.*, 336 U.S. 271, 275 (1949).

ARGUMENT

I. Title 28 of United States Code Section 1447(d) Barred the Court of Appeals from Reviewing the Remand

A. The Jurisdictional Bar of Section 1447(d) Is Broad, and Judicial Exceptions Are Meant to Be Narrow

For more than a century, "Congress has placed broad restrictions on the power of the federal appellate courts to review district court orders remanding removed cases to state court." *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995). The most recent codification of the statutory bar to appellate review of remand orders, 28 U.S.C. § 1447(d),

provides in broad and unambiguous terms that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ." The plain terms of that statute should have barred the court of appeals from reviewing the remand order here.

This Court has repeatedly recognized the reasons for a "'strong congressional policy against review of remand orders.'" *Things Remembered*, 516 U.S. at 136 (Ginsburg, J., concurring) (quoting *Sykes v. Texas Air Corp.*, 834 F.2d 488, 490 (5th Cir. 1987)). As this Court explained in *Kircher*: "The policy of Congress opposes 'interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed.'" 126 S. Ct. at 2152 (quoting *United States v. Rice*, 327 U.S. 742, 751 (1946)); *accord Osborn v. Haley*, 127 S. Ct. 881, 886 (2007). Indeed, even in the *Thermtron* decision, which for the first time recognized a non-statutory exception to section 1447(d), the Court acknowledged that goal: "There is no doubt that in order to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues, Congress immunized from all forms of appellate review any remand order issued on the grounds specified in § 1447(c)." *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 351 (1976) (citation omitted).[3] In his dissent, then-Associate Justice Rehnquist underscored the same goal—"to prevent the additional delay which a removing party may achieve by seeking appellate reconsideration of an order of remand"—and also warned of the problems that could be created by expansion of the newly-created exception. *Id.* at 354–55, 357 (Rehnquist, J., dissenting).

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[3] *Thermtron* permitted appellate review of a remand that was based upon an overcrowded docket, finding such a remand flatly unauthorized by Congress. 423 U.S. at 351.

In *Kircher*, this Court echoed those concerns, noting that the potential for delay was real and substantial, and bemoaning "nearly three years of jurisdictional advocacy" in that case as "confirm[ing] the congressional wisdom" of section 1447(d). 126 S. Ct. at 2152. This case involves a similar delay of more than two years, from a removal in 2002, a remand that same year, and an appeal to the Ninth Circuit, resulting in an affirmance in late 2004, which is still under attack three years later. Unfortunately, the federal reporters are full of such stories.[4]

The bar of section 1447(d) is intended to sweep broadly, "apply[ing] equally to cases removed under the general removal statute, § 1441, and to those removed under other provisions." *Kircher*, 126 S. Ct. at 2153. Where section 1447(d) applies, "'review is unavailable no matter how plain the legal error in ordering the remand.'" *Id.* at 2154 (quoting *Briscoe v. Bell*, 432 U.S. 404, 413–14 n.13 (1977)). Thus, although Powerex focuses its brief on alleged misreadings of the FSIA (Pwx. Br. 20–39), or alleged errors regarding subject matter jurisdiction (*id.* at 41–47), neither point can win the day ***even if correct***. Both arguments seek to show error in the remand, but "a remand premised on an erroneous conclusion of no jurisdiction is unappealable." *Kircher*, 126 S. Ct. at 2154.

The breadth of this principle is well established. In *Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723 (1977) (per curiam), the defendant removed on the basis of diversity

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[4] An amicus brief filed in *Kircher* referred to a survey of 250 recent appellate decisions analyzing the application of section 1447(d), the majority of which found an exception to the bar on appellate review. Brief of Law Professors Arthur R. Miller *et al.* as Amici Curiae Supporting Petitioners, at 11 n.5, *Kircher v. Putnam Funds Trust*, 126 S. Ct. 2145 (2006) (No. 05-409) ("LP. Amicus Br."). We understand that Professor Miller and others intend to file an amicus brief here, so we will leave to them further elaboration of the lower courts' confusion and unwarranted expansion of the exceptions to section 1447(d), both of which are reflected in this case and in Powerex's arguments on jurisdiction.

jurisdiction, alleging that it was a Missouri corporation. *See In re Southwestern Bell Tel. Co.*, 535 F.2d 859, 860 (5th Cir. 1976) (per curiam). Based on defendant's pleadings in a previous suit, the district court held that defendant was estopped from claiming that it was not a Texas citizen, and therefore remanded the case for lack of diversity jurisdiction. On writ of mandamus, the Fifth Circuit acknowledged the "general rule" that remand orders are unreviewable, but read *Thermtron* to permit review of the district court's estoppel decision, because that issue in and of itself was not "jurisdictional." *Id.* at 860–61.

This Court summarily reversed in a brief per curiam opinion. It rejected the premise that a district court order that had "employed erroneous principles in concluding that [the court] was without jurisdiction" was appealable. *Gravitt*, 430 U.S. at 723. Instead, this Court expressly confirmed that "*Thermtron* did not question but re-emphasized the rule that § 1447(c) remands are not reviewable." *Id.* at 724. Thus, because "[t]he District Court's remand order was plainly within the bounds of § 1447(c)," it "was unreviewable by the Court of Appeals." *Id.* at 723.

B. The District Court Remanded This Case for Lack of Subject Matter Jurisdiction Pursuant to Section 1447(c)

1. *The District Court Said Numerous Times that It Was Remanding for Lack of Subject Matter Jurisdiction, Cited Section 1447(c), and Never Said Anything Different*

The district court's statements about its remand order are obviously crucial in determining whether a case was remanded pursuant to section 1447(c). "If a trial judge ***purports*** to remand a case on the ground that it was removed 'improvidently and without jurisdiction,' his order is not subject to challenge in the court of appeals." *Thermtron*, 423 U.S. at

343 (quoting prior version of § 1447(c)) (emphasis added). There are no magic words or code sections that must be invoked for section 1447(d) to apply. In *Kircher*, this Court noted that what is important is that the district court "understood that it was making a jurisdictional ruling." 126 S. Ct. at 2156. Here, it is quite clear, from both its words and the circumstances, that the district court understood and intended that it was making a jurisdictional ruling.

First, the order of remand had only one principal subject matter heading: "I. Subject Matter Jurisdiction over the Removed Actions." Pet. App. 20a. The order had only two secondary headings: "A. Jurisdiction Over the 'Foreign State' Cross Defendants" and "B. Jurisdiction Over the United States Cross Defendants." *Id.* at 20a, 38a. The order uses the term "jurisdiction" almost fifty times, and contains nothing suggesting any other basis for remand.

Further, when certain defendants moved immediately to stay the remand order, the district court declined to do so, because "the premise of the Court's order was that it did not have subject matter jurisdiction over the removed actions," explicitly referring to section 1447(c) on eleven occasions. JA 281–85. The court also quoted its own comment at oral argument that "'the issue hinges, then, on the Court's jurisdictional authority to hear the removed claims.'" *Id.* at 283; *see also id.* at 284 ("In light of the Court's ultimate conclusion that the entire case has to be remanded for lack of subject matter jurisdiction, the Court's determination that the Cross-Defendants are immune under the FSIA is a jurisdictional finding."). Finally, in a third order issued a week later that denied BPA's motion to clarify, the district court again confirmed that it had "determined that it lacks subject matter jurisdiction over [the] removed claim." JA 288.

Thus, the "label" the court used, *Kircher*, 126 S. Ct. at 2153, consistently and repeatedly, was lack of subject matter jurisdiction, with explicit references to section 1447(c).

Powerex bravely asserts that "there is no clear label to be found" in the trial court's order, Pwx Br. 46, apparently ignoring the words used and referring only to the lack of an explicit reference to section 1447(c) in the initial remand order. Powerex tries to dispose of the court's citation to section 1447(c) in the order denying the stay as an "after-the-fact recharacterization." *Id.* at 47 n.58. But the initial remand order used the words "subject matter jurisdiction" throughout. *Id.* at 20a–44a. And all three of the district court's orders, issued in quick succession, are entirely consistent with one another and with the court's comments about "jurisdiction" at oral argument (which preceded the alleged "recharacterization"). Where the court did refer to a statute, it was section 1447(c). As in *Kircher*, the district court surely "understood that it was making a jurisdictional ruling." 126 S. Ct. at 2156.

Powerex's implicit assertion that the district court had to cite section 1447(c) in its initial order for Congress's bar on appeals to apply is utterly without support. For example, the Second Circuit applied section 1447(d)'s jurisdictional bar in far more challenging circumstances in *Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116 (2d Cir. 2003). There, "the district court never used the words 'subject matter jurisdiction,' 'federal question jurisdiction,' or even 'jurisdiction' when ordering a remand, [but] such phrases are not necessary for our analysis." *Id.* at 128–29. Rather, the court of appeals must "read[] the remand order in the most logical light possible." *Id.* at 121; *accord In re WTC Disaster Site*, 414 F.3d 352, 367–68 (2d Cir. 2005) (no appellate jurisdiction over remand order even though "the court did not, in the main body of its opinion, mention § 1447(c)"). Even stronger is the rule announced in *Heaton v. Monogram Credit Card Bank*, 231 F.3d 994, 997 (5th Cir. 2000), that only where the district court "clearly and affirmatively relies on" a code section ***other*** than section 1447(c) will appeal be permitted.

Also unavailing is Powerex's reliance on an out-of-context quotation of a preliminary phrase from the remand order, that "'the actions were properly removed in the first instance.'" Pwx. Br. 41. The full quote from the order is:

> None of the parties contend that the cross-claimants could not remove these actions under the provisions of 28 U.S.C. §§ 1441 and 1442. ***Rather plaintiffs argue that the court lacks jurisdiction over the removed actions and, as such, they must be remanded.*** The issue hinges, then, on the court's ***jurisdictional authority*** to hear the removed claims, not whether the actions were properly removed in the first instance.

Pet. App. 20a (emphasis added).

Powerex's assertion that the isolated words are an acceptance of subject matter jurisdiction is quite unfair to the district court, and flatly wrong. Surely the district court did not mean say at the outset of its order that it had subject matter jurisdiction, when that was the very issue it addressed and decided negatively in the remainder of the order. Nor was it the case that "none of the parties" challenged subject matter jurisdiction. The Plaintiffs-Respondents, the only moving party on the remand motion, surely did—as the court noted. *Id.* It is plain that the trial court was confirming that no one challenged the procedural correctness of the removal, and that the only issue before him was subject matter jurisdiction.

2. *Section 1447(d) Prohibits the Appellate Courts from Second-Guessing the Basis for a Remand*

Most of Powerex's appellate jurisdiction argument hinges on second-guessing the district court's basis for its remand order in an effort to recast it as a remand of a supplemental claim. This argument fails for multiple reasons. *See* Parts I.D.1., and I.E, below. Most fundamentally, that was not the articulated basis for the remand.

In applying section 1447(d), the court of appeals may not recast the basis for the remand and thus create appellate jurisdiction. As this Court said in *Kircher*, "right or wrong [the district court] understood that it was making a jurisdictional ruling." 126 S. Ct. at 2156; *see also Linton v. Airbus Indus.*, 30 F.3d 592, 600 (5th Cir. 1994) ("[e]fforts to dissect the reasoning of that conclusion [of no district court jurisdiction] so as to find appellate jurisdiction are little more than veiled attempts to investigate indirectly the correctness of the district court's conclusion"). Other lower courts have also reached the same conclusion. The Tenth Circuit explained that, "the district court need not be correct in its determination that it lacked subject matter jurisdiction, however, so long as it made that determination ***in good faith***." *Archuleta v. Lacuesta*, 131 F.3d 1359, 1362 (10th Cir. 1997); *see Adkins v. Illinois Cent. R.R.*, 326 F.3d 828, 834 (7th Cir. 2003) ("the only important point is that the district court did not ***think*** that [anything] saved its jurisdiction"); *accord Heaton*, 231 F.3d at 997 (no appeal absent clear and affirmative reliance by district court on non-section 1447(c) basis).

As its opinion reflects, the district court "understood" its remand order to be for lack of jurisdiction, made that decision in "good faith," and did not think that anything "saved its jurisdiction." Pet. App. 18a–44a. Indeed, the ultimate statement on the subject in *Kircher* could be repeated here verbatim: "[E]ven if it is permissible to look beyond the court's own label, the orders are unmistakably premised on the view that removal jurisdiction" was lacking. 126 S. Ct. at 2153. Some members of this Court would go further. *See id.* at 2157–59 (Scalia, J., concurring) (district court's invocation of jurisdictional ground should end the inquiry). But whichever test is employed, the result here is the same. The label is clear, the intent is clear, and there is no ambiguity.

3. *The District Court Ruled that It Had Not Obtained Subject Matter Jurisdiction Through the BPA/WAPA Removal Because of the Derivative ~~Jurisdiction~~ Doctrine and Because of Sovereign Immunity*

The district court's statements that it had no jurisdiction should end the inquiry. However, as Powerex and amici have labored mightly to challenge that court's jurisdictional analysis, we are forced to respond.

The district court held that it had no jurisdiction over BPA and WAPA because of the "derivative jurisdiction" doctrine. Pet. App. 41a–44a. As explained in *Lambert Run Coal Co. v. Baltimore & O.R. Co.*, 258 U.S. 377 (1922), that doctrine provides: "If the state court lacks jurisdiction of the subject matter or of the parties the federal court acquires none [on removal], although it might in a like suit originally brought there have had jurisdiction." *Id.* at 382.

Here, the state court did not have jurisdiction over the cross-claims against BPA and WAPA because the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b)(1) and 2679(b)(1), provides that the federal courts have exclusive jurisdiction over suits against federal agencies. Since the superior court had no jurisdiction over these cross-claims or parties, the removal petition could not create jurisdiction in the district court. *Lambert Run Coal Co.*, 258 U.S. at 382.

The statutory scheme regarding the derivative jurisdiction doctrine has changed twice in recent years, but the changes do not affect the result here. In 1986, Congress amended 28 U.S.C. § 1441 in a manner that suggested to some courts that the derivative jurisdiction doctrine might have been abrogated, at least for section 1441 cases.[5] However, Congress

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[5] *See* Judicial Improvement Act of 1985, Pub. L. 99-336, § 3, 100 Stat. 633, 637 (1986), adding subsection (e) to 28 U.S.C. § 1441.

amended section 1441 again in 2002,[6] making clear that the doctrine remained in full force, at least as to section 1442 removals.[7] The BPA and WAPA removal was made pursuant to section 1442.[8] Pet. App. 41a–44a.

Moreover, even without the derivative jurisdiction doctrine, the claims against BPA and WAPA did not create subject matter jurisdiction because of those entities' sovereign immunity. "Sovereign immunity is jurisdictional in nature." *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). Thus, where a court finds a federal agency immune from suit, the appropriate remedy is dismissal under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. *E.g.*, *Angelides v. Baylor College of Medicine*, 117 F.3d 833, 835–37 (5th Cir. 1977); *Fordjour v. Sheets*, 143 Fed. Appx. 770, 772 (9th Cir. 2005); *Numrich v. United States Postal*

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[6] Twenty-First Century Department of Justice Appropriations Authorization Act, Pub. L. 107-273, § 11020(b)(3)(A), 116 Stat. 1758, 1827 (2002), which redesignated former subsection (e) as (f) and amended the section as follows: "The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim."

[7] 14B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3721, at 172 (Supp. 2006) ("New § 1441(f) limits the abrogation of the derivative jurisdiction doctrine to cases removed under 28 U.S.C.A. § 1441"). With this amendment, "Congress left no doubt that Section 1441(f) applies only to removals under Section 1441 and not to removals under any other section of the United States Code." *Barnaby v. Quintos*, 410 F. Supp. 2d 142, 144 (S.D.N.Y. 2005).

[8] Indeed, even before the 2002 amendment, the majority of the circuits addressing the issue had held that the derivative jurisdiction doctrine remained the law as to removals under 28 U.S.C. § 1442. *See Kasi v. Angelone*, 300 F.3d 487, 503 n.6 (4th Cir. 2002); *In re Elko County Grand Jury*, 109 F.3d 554, 555 (9th Cir. 1997); *Edwards v. United States Dep't of Justice*, 43 F.3d 312, 316 (7th Cir. 1994).

Service, No. CV-01-532-ST, 2002 WL 31440877 (D. Or. Jan. 3, 2002).[9]

4. *The District Court Ruled that It Had Not Obtained Subject Matter Jurisdiction Through the BC Hydro Removal Because of BC Hydro's Immunity*

The removal by BC Hydro, an immune foreign sovereign, also did not provide the district court with subject matter jurisdiction. Section 1604 of the FSIA, entitled "Immunity of a foreign state from jurisdiction," provides that "[a] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604. Similarly, 28 U.S.C. § 1330(a) provides that "the district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity . . . ." Thus, as this Court pointed out in *Verlinden B.V. v. Central Bank of Nigeria*, "[i]f one of the specified exceptions to sovereign immunity applies, a federal district court may exercise subject-matter jurisdiction . . . but if the claim does not fall within one of the exceptions, federal courts lack subject-matter jurisdiction." 461 U.S. 480, 489 (1983); *accord Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989).

As the Ninth Circuit itself explained in *Security Pacific Nat'l Bank v. Derderian*, "federal jurisdiction over both foreign and non-foreign parties does not attach until it is

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[9] Amicus United States' argument that there was "removal jurisdiction" even if not "subject matter jurisdiction" does not account for or undercut the derivative jurisdiction analysis. *See Edwards*, 43 F.3d at 316. It is erroneous in any event, as discussed in Part I.C.3., below.

determined that the foreign sovereign lacks immunity from jurisdiction under the provisions of the FSIA." 872 F.2d 281, 283 (9th Cir. 1989). Thus, because the district court found BC Hydro immune, a decision which (like the BPA/WAPA decision) is now final, no jurisdiction was created by BC Hydro's removal.

5. *The District Court Ruled that It Had Not Obtained Subject Matter Jurisdiction Through the Powerex Removal Because Powerex Is Not a "Foreign State"*

Like BC Hydro, Powerex removed on the basis that it was "an agency or instrumentality of a foreign state," entitled to remove under sections 1441 and 1603. The district court found that it was not entitled to sovereign status, a decision that deprived the court of subject matter jurisdiction. Again, the text of 28 U.S.C. § 1330(a) is instructive: If there is no "foreign state," there is no subject matter jurisdiction under that statute. *See Linton*, 30 F.3d at 594.

In *Linton*, the district court held that the Airbus defendants, which had removed to federal court under the FSIA, did not qualify as instrumentalities of foreign states, and remanded for lack of subject matter jurisdiction. Airbus appealed, but the Fifth Circuit dismissed the appeal under section 1447(d), holding that the district court's remand, based on a determination that Airbus was not a foreign state, was jurisdictional and thus unappealable. *Linton*, 30 F.3d at 600; *accord Mobil Corp. v. Abeille Gen. Ins. Co.*, 984 F.2d 664, 666 (5th Cir. 1993).[10]

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[10] Powerex attacks *Linton* by claiming that it represents a minority view. However, Powerex is talking about a different issue discussed in *Linton*—whether it would matter if subject matter jurisdiction existed at the time of removal but was later lost. Pwx. Br. 44-45 n.54; *see* US Br. 8 n.3. We discuss this "timing" issue below in Part I.D.2., but emphasize here that the key holding of *Linton* and *Mobil* (that a remand based on lack of "foreign sovereign" status is a remand for lack of subject matter

Indeed, the situation in *Linton* (and here) is parallel to that described in *Kircher*:

> Once removal jurisdiction . . . is understood to be restricted to [preempted] actions . . . a motion to remand claiming the action is not [preempted] must be seen as posing a jurisdictional issue. . . . [T]he district court's order comes because its adjudicatory power has been exercised and its work is done. ***But its adjudicatory power is simply its authority to determine its own jurisdiction to deal further with the case. The work done is jurisdictional, as is the conclusion reached and the order implementing it.***

Kircher, 126 S. Ct. at 2155–56 (citations and footnotes omitted; emphasis added).

Here too, as to Powerex, BC Hydro, BPA and WAPA, the district court had "jurisdiction to decide its jurisdiction," but having done so, remanded for lack of subject matter jurisdiction. That is what the district court said it was doing, and what it was supposed to do, and even an error (not shown by Powerex) would not have made its decision appealable. *Kircher*, 126 S. Ct. at 2154 (review unavailable "no matter how plain the legal error"); *Osborn*, 127 S. Ct. at 895 (an appeal cannot be taken "whenever the district court misconstrues a jurisdictional statute").

C. The Bases upon Which the Ninth Circuit Accepted Jurisdiction Will Not Withstand Scrutiny

The Ninth Circuit held that it had jurisdiction because the issues on appeal were "substantive," "preceded the remand order," and were "apart from issues of jurisdictional or procedural defects leading to remand." Pet. App. 10a. These stated bases for jurisdiction have mostly been abandoned or

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jurisdiction) is not a minority position, is compelled by *Verlinden* and, indeed, Powerex has cited no authority to the contrary.

recast by Powerex, and, indeed, are not consistent with this Court's decisions under section 1447(d).

1. *The FSIA Rulings Neither "Preceded" the Remand Nor Were They "Apart From" It*

The determination that Powerex was not a foreign sovereign did not in any sense "precede" the district court's remand decision; it was part and parcel of the same decision, and no more "preceded" the remand decision than did the decision on preemption in *Kircher*. This "preceded" phraseology may be an invocation of *Waco v. United States Fid. & Guar. Co.*, 293 U.S. 140 (1934), where the district court dismissed a newly added party as unnecessary and improper, and then remanded the case because the dismissal had destroyed diversity jurisdiction. This Court found the dismissal appealable, but not the remand. *Id.* at 143-44; *see Kircher*, 126 S. Ct. at 2156 n.13. In this case, there is no separate ruling parallel to the dismissal in *Waco*. *Cf. id.* (the "remand order here cannot be disaggregated"); *Osborn*, 127 S. Ct. at 909 (Scalia, J., dissenting) (distinguishing *Waco* because the appeal in that case, if successful, "would not have subverted the remand" order, and thus there were plainly two "separate orders").[11]

Nor was the decision that Powerex was not a foreign sovereign "apart from" the remand decision. The Ninth Circuit has explained elsewhere:

> The district court's decision . . . rather than being apart from the question of subject matter jurisdiction, was necessary to determine whether such jurisdiction existed.

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[11] Powerex's new suggestion, not made below, that "disaggregation" along the lines suggested by Justice Souter's opinion in *Osborn* will help them here, is puzzling. It is not clear what can be disaggregated. The right to a bench trial from the right to a federal forum? One decision was made here—to remand—and it is unappealable. *See Kircher*, 126 S. Ct. at 2153-54.

> . . . In deciding whether subject matter jurisdiction exists, a district court will reach legal conclusions . . . . [Appellant] merely disagrees with the legal conclusion that the district court drew.

Hansen v. Blue Cross of California, 891 F.2d 1384, 1388 (9th Cir. 1989).

2. *Calling the Rulings "Substantive" Makes No Difference*

The Ninth Circuit erred because, at least since *Gravitt*, it has been clear that a jurisdictional remand is non-appealable no matter what type of legal issues underlie that jurisdictional holding. Indeed, the Seventh Circuit made this same mistake in *Kircher v. Putnam Funds Trust*, 373 F.3d 847, 850 (7th Cir. 2004), and was reversed by this Court. *Kircher*, 126 S. Ct. at 2154 (disagreeing with the court of appeals' view that its decision "rested simply on an application of ***substantive*** law" and finding instead that it was "dictated by its finding that it lacked removal jurisdiction") (emphasis added). *Spielman* also rejected the "substantive" label as not useful in this context, noting that the Ninth Circuit itself had limited the purported "substantive" exception to section 1447(d) to decisions which were not "necessary to determine whether subject matter jurisdiction existed." 332 F.3d at 129–130.

3. *The Court's Authority to Decide Its Jurisdiction Does Not Constitute Subject Matter Jurisdiction*

The Ninth Circuit stated that, "because BPA, WAPA and BC Hydro properly removed the case . . . [s]uch a removal removes the ***entire*** case . . . [and] the district court accordingly did not lack jurisdiction to decide the issues of immunity of BPA, WAPA and BC Hydro and of the sovereign status of Powerex." Pet. App. 10a. With respect, this is not only wrong as a matter of law, as discussed

immediately above, but is at best a disagreement with the district court on jurisdictional law, not a basis for appellate jurisdiction. *Osborn*, 127 S. Ct. at 895–96.

If the Ninth Circuit's view were correct, then in *Gravitt*, the district court would have had "jurisdiction" to decide estoppel, and the remand would not have been under section 1447(c). Similarly, under this theory, the district court in *Kircher* would have had "jurisdiction" to decide preemption, again evading section 1447(c). In neither case did this Court see it that way. The "power to decide" is what this Court called, in *Kircher*, the district court's "adjudicatory power . . . to determine its own jurisdiction to deal further with the case. ***The work done is jurisdictional, as is the conclusion reached and the order implementing it***." *Kircher*, 126 S. Ct. at 2155–56 (emphasis added). That is, the power to decide jurisdiction (and here immunity, which governs jurisdiction) does not itself constitute subject matter jurisdiction, and it does not take the remand outside sections 1447(c) and (d).

This also appears to be what amicus United States refers to in its discussion of "removal jurisdiction," which it seems to distinguish from "subject matter jurisdiction." US Br. 13–15. We are not aware of different meanings for these terms, and note that they are commonly interchanged for one another. *See Kircher*, 126 S. Ct. at 2151, 2153–56. If by "removal jurisdiction," the United States means the district court's technically proper receipt of a case upon the filing of a timely removal petition, subject of course to a remand motion, that is ***not*** subject matter jurisdiction. *See Gravitt*, 430 U.S. at 723–24. If, however, the Government means that subject matter jurisdiction on removal under section 1441(d) is broader than original jurisdiction under section 1330, there are several responses. First, this is merely another way of disputing the district court's holding that it did not have jurisdiction—it is not a way to make it appealable. Assuming arguendo that the district court had some sliver of subject matter jurisdiction

over BC Hydro's removal (or BPA's), that is, again, merely an error on a jurisdictional matter, not cognizable on appeal. *Kircher*, 126 S. Ct. at 2153.

Second, the United States appears to be wrong about the breadth of section 1441(d). *Verlinden* holds that a lack of sovereign immunity is a required element of subject matter jurisdiction under the FSIA. 461 U.S. at 493–94. True, *Verlinden* was not a removal case, but *Security Pacific* says the same thing in the removal context: "[F]ederal jurisdiction over both foreign and non-foreign parties does not attach until it is determined that the foreign sovereign lacks immunity." 872 F.2d at 283. And most significantly for appealability, *Security Pacific* says, "[w]hen a district court finds that a foreign sovereign is immune, 28 U.S.C. § 1447(c) mandates remand because the case 'was removed improvidently and without jurisdiction.' Section 1447(c) applies because the district court is ***without jurisdiction*** under 28 U.S.C. § 1330(a)." *Id.* at 284 n.6 (emphasis added).[12]

D. Powerex's Additional Arguments for Appellate Jurisdiction Are Mistaken

1. *The Remand Was Not of a Supplemental Claim*

Powerex's theory that this remand was not made pursuant to section 1447(c) requires it to identify an alternative ground, and it has identified supplemental jurisdiction. *See* 28 U.S.C. § 1367. This is convenient, because several lower courts have held that remands of supplemental claims are appealable notwithstanding section 1447(d). As we explain below in Part I.E., these holdings are erroneous. More critically, this was not a supplemental jurisdiction remand. First, the district

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[12] The only purportedly contrary case cited, *Nolan v. Boeing Co.*, 919 F.2d 1058 (5th Cir. 1990), does not address appealability, and holds only that removal of a cross-claim brings with it the underlying claim, *id.* at 1064—a point never disputed here.

court did not say it was, but said it lacked subject matter jurisdiction as to all the cross-claims. Second, it could not have been a supplemental jurisdiction remand because supplemental jurisdiction requires that the court have jurisdiction over at least one claim, and there was none here.

Section 1367(a) provides for supplemental jurisdiction "in any civil action of which the district courts have original jurisdiction . . . ." Here, there was no original jurisdiction, and without original jurisdiction, there can be no supplemental jurisdiction. *Herman Family Revocable Trust v. Teddy Bear*, 254 F.3d 802, 805–07 & n.3 (9th Cir. 2001). If the mere power to decide jurisdiction created jurisdiction to which supplemental jurisdiction could append, then *Kircher* and many other decisions could have come out the other way.[13]

2. *Subject Matter Jurisdiction Was Lacking from the Outset*

Powerex also asserts that an appeal is barred under section 1447(d) only if jurisdiction was lacking in the district court at the outset. Pwx. Br. 42–43. Powerex appears to have over-

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[13] Powerex relies on the Wright and Miller treatise and *District of Columbia v. Merit Sys. Prot. Bd.*, 762 F.2d 129 (D.C. Cir. 1985), ("*MSPB*"), for the proposition that the removal by BPA/WAPA could create supplemental or ancillary jurisdiction here. Pwx. Br. 45-46 & n.56. However, that treatise says only that federal jurisdiction created by federal agency removal supports supplemental jurisdiction which can survive even after the federal claim is "dismissed or settled." 14C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure*, § 3727, at 171-72 (3d ed. 1998). This language does not appear to address dismissals for lack of subject matter jurisdiction. The important distinction between these situations is set out in *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 126 S. Ct. 1235, 1244–45 (2006) (dismissal for lack of jurisdiction requires dismissal of supplemental claims, but dismissal on the merits permits retention of supplemental claims). *MSPB* presents a unique and confusing set of facts, but to the extent it holds that supplemental jurisdiction may exist even if original jurisdiction does not, it appears contrary to the weight of authority cited herein.

stated the lower courts' agreement on this issue,[14] and the assertion runs counter to the 1988 amendment to section 1447(c).[15] In any event, the district court ***never*** had subject matter jurisdiction. The court here, like the district court in *Kircher*, had the power to decide its jurisdiction, and nothing more. Unlike the situations in the cases cited by Powerex, nothing changed here. No federal claims were added, deleted, resolved or settled to extinguish jurisdiction. All that occurred was that the district court held at the first opportunity that it was without subject matter jurisdiction. The cases addressing remands based upon changes in circumstances are off-point.[16]

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[14] Although Powerex and the United States suggest that only *Linton* holds to the contrary, Pwx. Br. 44-45 n.54; *see* US Br. 8 n.3 (citing the same cases), it appears that the circuits are more badly split. *See* 16 James Wm. Moore, *Moore's Federal Practice* § 107.44 (3d ed. 2006).

[15] In 1988, 28 U.S.C. § 1447(c) was amended to substitute the present language: "If ***at any time before final judgment*** it appears that the district court lacks subject matter jurisdiction, the case shall be remanded," for the previous language: "If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case . . . ." Judicial Improvements and Access to Justice Act of 1988, Pub. L. 100-702, § 1016(c)(1), 102 Stat. 4670. Given this language change, a remand because the district court had lost its previously existing jurisdiction is within section 1447(c) and an appeal would accordingly be barred by section 1447(d). The United States' contrary argument, as the Law Professors note (LP Amicus Br. 4-5), is based on legislative history that is inconsistent with statutory language. US Br. 9–10. The United States also attempts to provide policy reasons why such a "timing" exception makes sense, US Br. 11, but its argument is really directed against ***remands*** after events have occurred in the district court depriving it of jurisdiction, rather than in favor of ***appeals*** from such remands.

[16] Moreover, this is yet another spurious method around section 1447(d). Were Powerex (and the United States) correct on this point, it would have provided a far simpler basis for deciding *Osborn*. It could be said that the removal in *Osborn* was initially appropriate because of the Attorney General's certificate, and the remand came "later," after the dis-

3. *Remands Under the FSIA Are Not Exempt from Section 1447(d)*

Finally, Powerex asks this Court to create a new judicial exception, providing that all remands pursuant to the FSIA are exempt from section 1447(d). The short answer to this argument, never made below, is that the policy issues Powerex wishes to debate must be put to Congress.

As this Court has noted, "absent a clear statutory command to the contrary," the prohibition in section 1447(d) on appellate review "applies 'not only to remand orders made in suits removed under [the general removal statute], but to orders of remand made in cases removed under ***any other statutes***, as well.'" *Things Remembered*, 516 U.S. at 128 (quoting *Rice*, 327 U.S. at 752) (alteration in original). "We assume that Congress is 'aware of the universality of the practice' of denying appellate review of remand orders when Congress creates a new ground for removal." *Id.*

Indeed, where Congress has wished to create exceptions to section 1447(d), it has done so. Section 1447(d) itself excludes civil rights cases removed under section 1443. Two other statutes give the Resolution Trust Corporation and the Federal Deposit Insurance Corporation the right to appeal a remand order,[17] and another permits the United States to appeal remand orders in cases involving Indians.[18] Most

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trict court rejected the certificate and denied the motion to substitute. Although the Government presented this position in *Osborn*, US Br. 12-14, the Court did not address it. It proves far too much, and has no textual basis.

[17] *See* 12 U.S.C. § 1441a(1)(3)(C) (RTC "may appeal any order of remand entered by a United States district court"); 12 U.S.C. § 1819(b)(2)(C) (FDIC "may appeal any order of remand entered by any United States district court").

[18] *See* 25 U.S.C. § 487(d) ("the United States shall have the right to appeal from any order of remand" in a suit involving foreclosure or sale of "tribal land").

recently, the Class Action Fairness Act of 2005 ("CAFA") authorized "an appeal from an order of a district court granting or denying a motion to remand a class action to the State court" notwithstanding section 1447(d).[19]

Powerex argues that this Court's decision in *Osborn*, 127 S. Ct. 881, provides the basis for such an exception, but *Osborn* is quite different from this case. In *Osborn*, the Court addressed a provision of the Westfall Act, 28 U.S.C. § 2679(d)(2), which provides that in a state court suit against a federal employee, the Attorney General may certify that the employee was acting within his official duties. If the Attorney General does so, "[t]he certification of the Attorney General shall ***conclusively establish scope of office or employment for purposes of removal.***'" *Osborn*, 127 S. Ct. at 894 (quoting statute). The trial court in *Osborn* had rejected the Attorney General's certificate and remanded the case to state court. Given the clear statutory command that the certificate was "conclusive[] for purposes of remand," this Court held that "Congress gave district courts ***no authority*** to return cases to state courts on the ground that the Attorney General's certification was unwarranted." *Id.* (emphasis added).

This Court then had to resolve the direct statutory conflict between two "antishuttling provisions," the Westfall Act prohibiting remand after an Attorney General's certificate, and section 1447(d) prohibiting appeal of remand orders. The Court determined that the former prevailed, and an appeal could be taken. *Id.* at 895–96. But this Court cautioned that its holding was unique and could not be expanded to swallow the rule by being invoked "whenever the district court misconstrues a jurisdictional statute." *Id.* at 895. "Such an exception would, of course, collide head on with § 1447(d) and our precedent." *Id.* at 895–96. The Court concluded:

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[19] Pub. L. No. 109-2, § 5(a), 119 Stat. 4, 12 (to be codified at 28 U.S.C. § 1453(c)(1)).

"Only in the extraordinary case in which Congress has ordered the intercourt shuttle to travel just one way—from state to federal court—does today's decision hold sway." *Id.* at 896; *but see id.* at 901–02 (Souter, J., concurring and dissenting) and *id.* at 906–10 (Scalia, J., dissenting).

Thus, *Osborn*—and Justice Alito's similar opinion in *Aliota v. Graham*, 984 F.2d 1350 (3d Cir. 1993), which presciently predicted the holding in *Osborn*—do not help Powerex. They presented both a direct statutory conflict, not present here, and a close fit with *Thermtron*, where the district court was also "categorically preclude[d]" from remanding. *See Osborn*, 127 S. Ct. at 886. This case presents nothing similar.

Powerex also contends that the unavailability of appellate review of the remand (and the resultant loss of a bench trial) is contrary to our nation's foreign policy interests. That decision was Congress's to make, however. It granted a bundle of rights to foreign sovereigns, but those rights are limited. *See, e.g., Dole Food*, 538 U.S. at 477 (corporation owned indirectly by foreign government not covered by FSIA); *see also* 28 U.S.C. § 1605 (commercial exception to immunity). Where Congress has chosen to give only so much (including the right to seek removal) but no more (such as a right to appeal a remand) the judiciary will not override its policy decision. "To supply omissions transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 251 (1926).

It must also be remembered that Powerex has never claimed immunity. Its position is that it must be an "organ," and must have an appeal, because otherwise, it will face litigation before a California judge and jury. But Congress has already made the determination that foreign entities can receive a fair trial in state court, because it did not grant federal courts ***exclusive*** jurisdiction over such parties, and this Court has said that state courts are "equally competent bod[ies]." *Kircher*, 126 S. Ct. at 2156. If this case proceeds in state court, Powerex will get a fair trial.

E. There Was No Remand of a Supplemental Claim Here, But Had There Been, It Too Would Have Been Unappealable

As Justice Kennedy noted in his concurring opinion in *Things Remembered*, 516 U.S. at 130, this Court has never decided whether discretionary remands of supplemental claims are appealable. While that question ought not be decided here, given that this remand was pursuant to section 1447(c), Powerex's repeated efforts to recast this as a supplemental claim remand compel an explanation as to why such appeals should not be permitted.

Nothing in the text of section 1447(d) suggests an exception for supplemental claims, nor would logic suggest that although legal errors about jurisdiction are unappealable, Congress intended that discretionary errors about retaining supplemental claims may be tied up on appeal for years. Indeed, if a distinction were to be drawn, the opposite regime would appear more rational, but Congress has prohibited ***both*** types of appeals.

Powerex is correct that some lower courts have not seen it this way, and that is because of the broad language (but not the holding) of *Thermtron*. *Thermtron* held only that remands concededly made upon a non-existent legal basis (*i.e.*, crowded docket) are appealable. The Court's recent *Osborn* decision announced a similar holding, and both cases presented extreme circumstances described by then-Judge Alito as remands based on "grounds that [the court] had no authority to consider." *Aliota*, 984 F.2d at 1357. By contrast, a remand of a supplemental claim, recognized as proper in *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988), is in no way similar to the flatly-unauthorized remands in *Thermtron* and *Osborn*. Indeed, after *Carnegie-Mellon*, a remand of a supplemental claim is the legal equivalent of a section 1447(c) remand and should be equally unappealable. *See id.* at 356 ("an entirely different situation is presented when the

district court has clear power to decline to exercise jurisdiction [and] *Thermtron* therefore does not control").

Thermtron stated that remands are ***only*** permissible for the reasons stated in section 1447(c), and therefore ***only*** such remands were intended by Congress to be unappealable. This formulation is, of course, no longer correct. In *Carnegie-Mellon*, this Court acknowledged that "[t]he language from *Thermtron* [about reading section 1447(c) *in pari materia* with 1447(d)] . . . is admittedly far-reaching, but it loses controlling force when read against the circumstances of that case." 484 U.S. at 355. Thus *Thermtron*'s apparent holding that section 1447(c) is the only legitimate basis for a remand was overruled in *Carnegie-Mellon*. So when this Court says in *Thermtron* that "we are not convinced that Congress ever intended to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seemed justifiable to them," it surely was not talking about a case involving the legitimate remand of supplemental claims. 423 U.S. at 351.

Thus, if it becomes necessary to decide whether remands of supplemental claims are appealable, plaintiffs respectfully urge the Court to again cut back on the dicta, but not the holding, of *Thermtron*. Remands of supplemental claims bear no resemblance to the unauthorized remands in *Thermtron* and *Osborn*, nor to one other unique circumstance where remand orders are appealable.[20] Again, the plain text of section 1447(d) suggests that result, and a contrary result defies all logic and policy. No rational Congress would make that distinction, and our Congress has not done so in section 1447(d). *See Things Remembered*, 516 U.S. at 135

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[20] In *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996), this Court accepted the concession of the parties, *id.* at 711, that an abstention-based remand issued by a court with admitted subject matter jurisdiction is appealable. *Id.* at 712.

(Ginsburg, J., concurring) ("It would show little respect for the legislature were courts to suppose that the lawmakers meant to enact an irrational scheme.").[21]

II. The Lower Courts Correctly Concluded that Powerex Is Not an "Organ" of British Columbia

If this Court concludes that the court of appeals had appellate jurisdiction, it must decide whether the Ninth Circuit erred in concluding that Powerex is not an "organ" of the British Columbia government within the meaning of the FSIA. As explained in detail below, the district court and the Ninth Circuit reviewed all the evidence relating to Powerex's purpose, structure and function, and the nature of its relation with the Provincial government, and applied the controlling legal principles to those facts. Both courts determined that Powerex had not satisfied its burden under the Act. Pet. App. 15a–16a, 35a–36a. The Court should not revisit those fact-intensive rulings. As the Court noted in *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830 (1996), it will not "'undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.'" *Id.* at 840-41 (quoting *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)). No such error has been shown here.

A. To Be Deemed an "Organ of a Foreign State," an Entity Must Serve a Particular Governmental Function Under Active Supervision by the State

The threshold question in any FSIA determination is whether the entity in question is a foreign state, or the political subdivision, agency or instrumentality of a foreign state. 28

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[21] For similar reasons, remands that stem from post-removal events ought to be unappealable. *See Linton*, 30 F.3d 592. This is another spurious judicial exception to section 1447(d) stemming from the dicta in *Thermtron*.

U.S.C. § 1603(a). Section 1603(b)(2) provides that "agency or instrumentality" means any entity "which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." Because of the limited grant of certiorari, this case concerns only the "organ" prong of this provision.

As with any issue of statutory construction, the Court's analysis must begin with the statutory language, "and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (citation omitted). The Court should also consider the "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 508 U.S. 129, 132 (1993).

Congress did not define "organ" in the statute or its legislative history; however, "the FSIA was not written on a clean slate." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 612 (1992). The term "organ" has long been used by this Court when referring to a government-related entity, to mean a branch, arm or instrumentality of the government that performs a specific public function under the government's direction. *See, e.g.*, *Pasquantino v. United States*, 544 U.S. 349, 369 (2005) (the Executive Branch is "'the sole organ of the federal government in the field of international relations'").[22] This usage comports with the common dictionary definition of

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[22] See also *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973) ("We have repeatedly recognized that state reapportionment is the task of local legislatures or those organs of state government selected to perform it."); *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 261 (1951) ("Courts, unlike administrative agencies, are organs with historic antecedents which bring with them well-defined powers.").

organ as "an instrumentality exercising some function or accomplishing some end," and specifically in the relevant context here, "a governmental instrumentality operating as a ***part*** of a larger organization." Webster's Third New International Dictionary 1589 (1993) (emphasis added).

The lower courts have developed a general framework for analyzing whether a particular entity may properly be characterized as an "organ" of a foreign state. Typically, the factors examined include "the circumstances surrounding the entity's creation, the purpose of its activities, its independence from the government, the level of government financial support, its employment policies, and its obligations and privileges under state law." *Patrickson*, 251 F.3d at 807.[23] From this body of case law, a consensus has emerged that, whatever precise form an "organ" might take, at a minimum, it must "engage in a public activity on behalf of the foreign government." *USX*, 345 F.3d at 208.

This requires that the entity perform a function that the government typically would undertake itself, and that it be subject to ***active***, not passive, supervision by the government. *See, e.g., Board of Regents of the Univ. of Texas Sys. v. Nippon Tel. and Tel. Corp.*, No. 05-51432, 2007 WL 273957, at *4 (5th Cir. Feb. 1, 2007) (active government supervision required); *Peninsula Asset Mgmt. (Cayman) v. Hankook Tire Co.*, 476 F.3d 140, 2007 WL 241294, at *3 (2d Cir. 2007) (entity performs "traditional government functions" relating to oversight of financial institutions); *USX*, 345 F.3d at 202, 210 (entity meets "organ" test where it was acquired by government to help ensure stability of Irish economy, and where it consults with government on all major decisions). The courts also agree that the "organ" determination is highly fact-specific. Not every factor will be present in every case,

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[23] *See also Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 846–847 (5th Cir. 2000); *Filler v. Hanvit Bank*, 378 F.3d 213, 217 (2d Cir.), *cert. denied*, 543 U.S. 1022 (2004); *USX*, 345 F.3d at 206–207, 209.

and the court must analyze all the evidence from both a quantitative and qualitative standpoint. *See, e.g.*, *USX*, 345 F.3d at 209, 214; *Kelly*, 213 F.3d at 847.

The governmental-function and control requirements are consistent with the structure of the FSIA. As the United States points out, under the direct "ownership" prong of 28 U.S.C. § 1603(b)(2), all corporations in which the government directly owns a majority of shares are entitled to sovereign status regardless of purpose, function or governmental control. US Br. 20 (citing *Dole Food*, 538 U.S. at 474). Powerex has been held not to qualify under that prong of the statute. It is entirely plausible that Congress intended a different inquiry under the "organ" prong—one not focused on ownership but on function and control. As this Court noted in *Dole Food*, "control and ownership, . . . are distinct concepts." 538 U.S. at 477; *see also USX*, 345 F.3d at 211 ("We find that, although Congress favored ownership over control in the majority ownership prong, its use of the word 'organ' suggests an emphasis on control under the organ prong."). Both governmental function and active governmental control are therefore key elements of "organ" status.

Powerex and amici insist that the courts should apply the statute generously to accomplish Congress's goals. Pwx. Br. 22; BC Br. 7. A "broad" interpretation of the Act, they maintain, would "'be conducive to uniformity in decision.'" Pwx. Br. 20 (citing H.R. Rep. No. 94-1487, at 13 (1976) ("H.R. Rep.")); BC Br. 7. It is not clear why a broad interpretation (any more than a narrow one) would lead to consistency in decisions, but some courts accept this view. *See USX*, 345 F.3d at 207–08; *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1460 (9th Cir. 1995).[24]

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[24] As proof that Congress intended a broad construction of the term "organ," Powerex cites to Congress's statement in the legislative history that an "'agency or instrumentality of a foreign state' could assume a variety of forms," including, inter alia, "a state trading corporation, a

This argument ignores that other critical policy considerations also informed Congress's enactment of the FSIA. Thus, Congress recognized that "American citizens are increasingly coming into contact with foreign states and entities owned by foreign states." *Id.* at 6; *see Federal Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 624 (1983) ("*Bancec*"). "These interactions arise in a variety of circumstances, and they call into question whether our citizens will have access to the courts in order to resolve ordinary legal disputes." H.R. Rep. at 6.

In short, Congress realized that sovereignty determinations might leave injured parties without any forum, or more relevant here, might force them into a forum not of their choosing and deprive them of a jury trial. *USX*, 345 F.3d at 207–08 (broad federal jurisdiction under the FSIA has "significant procedural consequences, some of which a plaintiff likely will not welcome"). Therefore, "Congress sought to provide a more balanced legal posture between an injured private party and a foreign state-related defendant." Dellapenna, *supra*, at 31.

To protect this balance, an entity seeking "organ" status must demonstrate not only that it performs a specific governmental—not private—function, but also that the foreign government exercises meaningful control or supervision over

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mining enterprise . . . a shipping line or airline, a steel company, a central bank, [or] an export association[.]" H.R. Rep. at 15–16; *see* Pwx. Br. 22. In context, however, it is clear Congress was not specifically describing an "organ" here. It is more likely that Congress was describing what entities would qualify under the "ownership" prong of section 1603(b)(2), as virtually all of those mentioned are typical government-owned corporations. *See* Joseph W. Dellapenna, *Suing Foreign Governments and Their Corporations*, at 67 (2d ed. 2003) ("Dellapenna") (observing that the listed entities are "all typically structured as foreign-government-owned corporations"). Here Powerex has failed the "ownership" test. Pet. App. 16a.

its activities. *E.g.*, *USX*, 345 F.3d at 208, 212–13; *Kelly*, 213 F.3d at 846–48; *Patrickson*, 251 F.3d at 807–08. Requiring anything less would permit entities that are "only tangentially related to a foreign state" to claim foreign state status and its appurtenant privileges and protections, which "would be unfair to plaintiffs." *USX*, 345 F.3d at 208.

These words are particularly compelling here, where consumers chose to bring suit under California law in California's courts, only to find themselves removed to federal court (and deprived of a jury trial) by parties they did not even sue. An overly broad interpretation of "organ" would threaten the balance Congress sought to achieve.

B. Because Powerex Functions Like an Independent, for-Profit Private Enterprise, It Is Not an "Organ" of British Columbia

1. *Powerex Was Created for the Express Purpose of Maximizing Revenues—Typically a Private, Not Governmental, Function*

Powerex seeks to wrap itself in the mantle of sovereignty by recounting the history of the Columbia River Treaty and the formation of BC Hydro, and then portraying itself as just another instrumentality through which British Columbia seeks to exploit its natural resources. *See generally* Pwx. Br. 8–11. The courts' role, however, is to determine an entity's status as of the time the lawsuit was filed, not as of the date of its creation. *Dole Food*, 538 U.S. at 478. The proper focus of the inquiry, therefore, is on Powerex's current activities.

Powerex contends that its function is to "maximize the ***value*** of [the Province's] hydroelectric resources," and this supposedly constitutes the most important evidence of the company's "organ" status. Pwx. Br. 11 (emphasis added); *see id.* at 8, 18–19; BC Br. 4. This highlights a critical distinction between Powerex and BC Hydro. BC Hydro manages the Province's hydroelectric resources to ensure

reliable power for British Columbia. Pet. App. 32a, 50a; JA 116. By contrast, Powerex is principally engaged in power trading for profit, just like Duke, Reliant and Enron. Indeed, on its homepage Powerex portrays itself not as an arm of the British Columbia government, but as "a leading marketer of wholesale energy products and services in western Canada and the western United States, and a growing niche player in other markets across North America." *See* http://www.powerex.com.

Powerex was created in 1988 to market British Columbia's surplus hydroelectric power "in a manner that maximized the benefits [*i.e.*, the revenues] to all British Columbians." *See* Pet. App. 53a. In other words, Powerex's function was not to manage a Provincial resource, like BC Hydro, but simply to sell surplus power at the highest possible price. *See* JA 201 (Powerex was intended "merely to drive a good bargain in the U.S.A."); Pwx. ER 0782, 0784 (Powerex's CEO agreed that company's purpose is not to support BC Hydro's operations, but rather "to provide the Province with as much money as [it] can given [its] capabilities"). To be sure, the development and exploitation of a country's natural resources may be a characteristic function of government. *See, e.g.*, *Kelly*, 213 F.3d at 848. Seeking out profit-making opportunities, however, is not. Courts have recognized the distinction between serving an important governmental purpose and profit-seeking, and the latter purpose weighs against "organ" status. *See, e.g.*, *USX*, 345 F.3d at 210; *EOTT Energy Operating Ltd. P'ship v. Winterthur Swiss Ins. Co.*, 257 F.3d 992, 998 (9th Cir. 2001); *Kelly*, 213 F.3d at 847.

Powerex emphasizes that all of its profits benefit the people of British Columbia. Pet. Br. 26–27. The test under the FSIA, however, is not whether an entity's activities "benefit" the foreign state, but whether the entity performs a characteristically governmental function. *See Peninsula Asset*, 476 F.3d 140, 2007 WL 241294, at *3 (entity performs

"traditional government functions" of overseeing country's financial institutions). Indeed, if engaging in conduct that happens to "benefit" a foreign state were a sufficient "governmental" function, a great many more entities might qualify for "organ" status than Congress ever could have intended.[25] In *Board of Regents*, 2007 WL 273957, the Fifth Circuit rejected a similar argument. There, a telecommunications entity claimed that its enabling statute required it to provide universal service to Japan—plainly, a benefit to the Japanese people. But the court held that it was only one of a number of entities operating in a competitive field, and it "clearly serves market ends, ***not*** a government function, such as intervening to prevent 'a public financial crisis.'" *Id.* at *4 (quoting *USX*, 345 F.3d at 211).

The evidence shows that in Powerex's current broad-ranging energy trading business, selling British Columbia's surplus power is not one of Powerex's ***principal*** functions. JA 236; *see Dole Food*, 538 U.S. at 478 (courts examine status as of filing of lawsuit). The trading of Canadian Entitlement power, which Powerex touts as emblematic of its governmental status, accounts for only about fifteen percent of Powerex's sales. JA 251. Powerex buys power from 150–200 different sources, more than 70% of them located in the United States, not Canada. *Id.* With the exception of BPA, Powerex's principal, self-described competitors are private corporations, such as Duke. JA 252. And in addition to its electricity trading operation, Powerex now buys and sells natural gas in the United States, ***none*** of it acquired from BC Hydro. JA 249.

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[25] Powerex and amicus British Columbia emphasize that Powerex was granted the "exclusive" right to export surplus hydroelectric power. Pwx. Br. 25; BC Br. 12. Powerex acknowledges, however, that if it were not performing that function, neither the Province itself nor BC Hydro would be performing it. Pet. App. 59a–60a; BC Br. 12. This in itself is powerful evidence that what Powerex was created to do is not a typical function for the British Columbia government.

Finally, Powerex contends that its "governmental" role has expanded over the years to include (1) assignment of the Province's rights and obligations under the Columbia River Treaty; (2) performance of Provincial obligations under the Skagit River Treaty and the British Columbia-Seattle Agreement; and (3) responsibility under the Power for Jobs Development Act for providing subsidized energy to domestic businesses. Pwx. Br. 26. The first of these is addressed below in Part II.B.4. As for the remaining two, Powerex has failed to meet its burden to demonstrate the magnitude of these roles. It could very well be de minimis, or many of Powerex's functions may long since have been completed, in which case, these activities would have little bearing on whether Powerex now primarily performs governmental functions.[26]

2. *Powerex Was Incorporated and, in Most Respects, Functions Like Any Privately-Held Corporation, with Only Superficial Oversight by the British Columbia Government*

This Court has observed that while separately-constituted governmental entities may vary in organization and control, they tend to share certain common characteristics. For example, "[a] typical governmental instrumentality . . . is created by an enabling statute that prescribes [its] powers and duties . . . and specifies that it is to be managed by a board selected by the government in a manner consistent with the enabling law." *Bancec*, 462 U.S. at 624. Powerex was not created in this fashion.

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[26] For instance, Powerex claims that it "took the lead" in re-negotiating certain aspects of the Seattle agreement. Pwx. Br. 12. There is no evidence that this was anything other than a one-time task, and it appears to have no bearing on the activities that are the subject of the cross-claims against it.

Powerex was incorporated under the Company Act of British Columbia, and nothing in its Articles of Incorporation distinguishes it from any other ordinary privately-held corporation. JA 252–53; Pwx. ER 0236–60. By contrast, BC Hydro was created by legislation specifying in detail its powers, its legal rights and obligations, and how its directors are to be selected. Pet. App. 163a–189a. Similarly, BPA, WAPA and the government corporations mentioned by Powerex and the amici are all creatures of Congressional statutes that specify their powers, rights and obligations.[27] The lack of enabling legislation evidences Powerex's essentially private nature. In *Gates*, 54 F.3d 1457, the court found that the lack of day-to-day supervision over the hog marketing board's activities did not preclude "organ" status. But there, unlike here, "the Province's laws and regulations narrowly circumscribe[d] the entity's ability to act independently." *Id.* at 1461. What the Ninth Circuit found lacking here was any similar evidence of the Province's ability to "narrowly circumscribe [Powerex's] ability to act independently."

Powerex complains that the Ninth Circuit improperly ignored or discounted evidence that the Province "supervises Powerex's operations in a variety of ways," and that the company receives certain benefits as a government-related corporation. Pwx. Br. 28, 31. But the evidence of ***active*** supervision is weak. Powerex points to the fact that its financial results are consolidated with those of BC Hydro for accounting purposes, its board of directors is appointed by BC Hydro directors, it does not pay Canadian or Provincial income taxes, and it is subject to certain financial reporting requirements applicable to government-related entities. *Id.* at

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[27] *See, e.g.*, 16 U.S.C. § 832a (BPA); 42 U.S.C. §§ 7152, 7275 (WAPA); 16 U.S.C. § 831 (Tennessee Valley Authority); 36 U.S.C. § 300101 (Red Cross).

27–31. These factors, however, do not amount to the type of close supervision required under the case law.

For example, in *Board of Regents*, 2007 WL 273957, at *4, the Fifth Circuit concluded that the type of government authorizations granted to the Japanese government there, including the ***direct*** appointment of board members (not present here) and the approval of profit distributions, do not constitute "***active*** supervision," because if it did, "***any*** regulated public-service provider could claim sovereign status." *Id.*; *see also Patrickson*, 251 F.3d at 808 (nature of relationship with government there, similar to that present here, "is not considerably different from the control a majority shareholder would enjoy under American corporate law").

Moreover, an entity may be designated as "public" for certain purposes, and yet still not be subject to active governmental oversight. *See Board of Regents*, 2007 WL 273957, at *5 (being designated a public institution for disaster prepared-ness purposes does not make entity an "organ"). That is the case here. Powerex's exemption from taxation does not suggest that the Province is actively overseeing Powerex's activities, and the weight to be given Powerex's duties under some Provincial reporting laws is diminished by the fact that it is not included among the "public bodies" subject to at least one important public accountability law—British Columbia's Freedom of Information and Protection of Privacy Act, R.S.B.C. ch. 165 (1996) ("FIPPA").[28]

Powerex also asserts that the Province "control[s] . . . Powerex's financial exposure by a risk-management committee . . . that reports periodically to British Columbia's

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[28] The stated purpose of the FIPPA is "to make public bodies more accountable to the public" by "giving the public a right of access to [their] records . . . ." Appendix 1a. BC Hydro is listed among the "public bodies" subject to FIPPA, but Powerex apparently is not. Appendix 4a-5a.

Ministry of Finance." Pwx. Br. 29. Significantly, before the Ninth Circuit, BC Hydro sharply denigrated the degree of parental oversight reflected in this risk management policy. *See* Answering Brief of Appellee BC Hydro, filed in Reliant Appeal, at 37–40 (9th Cir. July 28, 2003). As BC Hydro showed, and Powerex's Treasurer admitted, there is nothing unique or particularly significant about these policies, and the lower courts were entitled to give them little or no weight. JA 226–27.

In other respects, Powerex functions much like any private energy company. It is undisputed that, as the district court concluded, "Powerex ***independently*** determines the quantity of BC Hydro surplus power to export, and ***independently*** determines what parties it will trade with and on what terms." Pet. App. 30a (emphasis added). Powerex is regulated like other private energy companies. JA 257–58. Significantly, however, it possesses no regulatory authority itself. JA 260. This factor also weighs against a finding of "organ" status under the FSIA. *Patrickson*, 251 F.3d at 808.

3. *Powerex's Employees Share in Its Profits, Enjoy Bonuses and Are Not Civil Servants*

Powerex insists that "its revenue does not result in any private profit" and "[o]nly the Province . . . ultimately benefit[s] from any income generated by Powerex's operations." Pwx. Br. 26. Apart from the fact that, as shown, profit-making does not constitute performance of a government function, this assertion omits one key fact: A substantial part of Powerex's revenues are used to pay large employee bonuses.

It is undisputed that Powerex's employees are not classified as civil servants. Pwx. Br. 34. They are selected solely by Powerex; no Provincial authority has any role in their selection. JA 260. They are not paid according to Provincial guidelines for public employees. JA 242. Courts routinely

conclude that the absence of civil service employees weighs heavily against a finding of "organ" status. *See, e.g., Board of Regents*, 2007 WL 273957, at *5; *USX*, 345 F.3d at 213.

More significantly, all of Powerex's approximately 120 employees are entitled to share in the company's profits through a bonus plan. JA 245. In this regard, Powerex's CEO testified that Powerex has "a bonus compensation program that's unique. No one else in the public service has anything like it." JA 242. Of the total employees, fifty to sixty energy traders are eligible for "larger" bonuses. JA 245. The bonus pool consists of a percentage of Powerex's net income, and recently has amounted to approximately $4–5 million per year. JA 245–46. Government employees do not typically receive five- or six-figure bonuses.

Powerex avoids ***any*** mention of these bonuses. Instead, it suggests that its employee compensation plans can be ignored in the "organ" analysis because its private employees' salaries are subject to "political" constraints. *See* Pwx. Br. 34–35; JA 242. This evasion will not wash. The type of "political" pressure that might keep a lid on salaries and bonuses exists in both the public and private spheres, and is not the equivalent of civil service constraints.

4. *Powerex Deals with BC Hydro at Arm's Length*

Powerex leans heavily on the Province's assignment to Powerex of its rights to receive Canadian Entitlement power. Pwx. Br. 10–11, 26. This fact does not help Powerex. With respect to the Canadian Entitlement and otherwise, Powerex deals with BC Hydro at arm's length, just as any private power marketer would do.

Before entering into the agreement with Powerex, the Province solicited and received competing proposals from Enron and from a consortium of other private entities,

including Duke, for the rights to market this power in the United States. JA 253. Powerex beat out those private concerns for the Province's business. Under the agreement, Powerex is required to pay the Province the "fair market value of Canadian Entitlement" power. JA 141.[29] In addition, as the district court noted, the Assignment Agreement expressly provides that:

> Powerex will not be or be construed as the agent of the Province and will be entitled to deal with the Canadian Entitlement Rights assigned to it under this Agreement as it sees fit without consultation with the Province. Any profits or losses with respect to sales of the Canadian Entitlement will be solely for the account of Powerex.

JA 151.

The United States criticizes the district court's reliance on this language, asserting that it is little more than a precautionary bit of legalese to clarify that Powerex is not the alter ego of the Province for liability purposes. US Br. 23 n.8. This utterly misses the significance of this language, which is one more piece of evidence belying Powerex's claim that it is subject to active oversight by British Columbia.

Powerex operates from this strictly arm's-length posture in its other dealings with BC Hydro as well. It sells power to BC Hydro at current market rates, regardless of how much Powerex paid for the power, and it buys power from BC Hydro at market rates, regardless of how much Powerex is able to get for that power. JA 254–55. And while BC Hydro performs certain services for Powerex (e.g., acting as its

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[29] The agreement contains an arbitration clause, incorporating commercial arbitration rules, in the event the parties disagree as to the price that Powerex should pay to the Province for Canadian Entitlement power. JA 149. Powerex included this clause because "[w]e will not pay them whatever they ask." JA 254.

payroll agent), "it's the same as an external service would be," and Powerex pays BC Hydro for those services at market rates. JA 220–23.[30]

C. The Ninth Circuit Carefully Weighed the Foregoing Factors and Properly Found Powerex's Evidence Wanting

The lower courts examined all of the evidence presented by the parties and concluded that, on balance, Powerex was not an "organ of a foreign state." Pet. App. 15a–16a, 35a–36a. The district court found particularly compelling the fact that "Powerex is not subject to the type of active governmental oversight" that characterized the government's role over the Alberta regulatory agency described in *Gates*, 54 F.3d at 1461. Pet. App. 35a. The Ninth Circuit weighed the same, essentially uncontroverted facts, and reached the same conclusion. *Id.* at 15a–16a. In other words, both courts did precisely what they were supposed to do.

Powerex and amici vigorously contend that the Ninth Circuit departed significantly from the accepted standards governing the "organ" determination, principally by "disregarding" Powerex's "public purpose" and instead resting its decision on the absence of certain indicia of government control. *See, e.g.*, Pwx. Br. 33; BC Br. 2, 4; US Br. 6–7. This fundamentally misconstrues both the Ninth Circuit's approach and the governing law. First, it was entirely appropriate, indeed necessary, for the court of appeals to consider not only the purposes Powerex serves (and it ***did*** consider its purposes (Pet. App. 16a)), but also the lack of British Columbia's

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[30] Indeed, the British Columbia Utilities Commission has determined that Powerex and BC Hydro deal with one another at arm's length. In 2000, the Commission "acknowledged that Powerex would not be a public utility if it acts at arms-length from B.C. Hydro." JA 275. Ultimately, the Commission concluded that Powerex in fact was not a public utility, based on additional information provided by BC Hydro. JA 255–56.

control over the company's activities. *See USX*, 345 F.3d at 211 (indicating that Congress's "use of the word 'organ' suggests an emphasis on control under the organ prong"). The fact that the court of appeals found especially significant Powerex's "high degree of independence" from governmental control (Pet. App. 16a) does not mean that the court did not consider all pertinent factors. It simply means that the court found the balance of factors did not favor "organ" status.

Powerex argues that not every factor needs to be present for "organ" status to be established. Pwx. Br. 24. But just as courts have noted that the presence of certain factors may be entitled to considerable weight, so too, the ***absence*** of key factors may have particular significance. *See, e.g.*, *USX*, 345 F.3d at 212–15. Here, the evidence emphasized by Powerex, even viewed collectively, simply could not compensate for Powerex's failure to demonstrate that its trading activities are subject to Provincial supervision or control, or that it principally performs a public function. In fact, by the time of the cross-claim here, Powerex had evolved into a typical energy marketing and trading company that engages primarily in the characteristically private endeavor of making profits from its operations and sharing those profits with its employees, unconstrained by active governmental oversight.[31]

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[31] Powerex and amici assert that the Ninth Circuit should not have added into the mix factors such as the company's lack of immunity from suit, and its indirect ownership by the Province. Pwx. Br. 34–36; US Br. 26–27. Courts have held, however, that the nature of the entity's ownership relationship with the foreign government properly ought to be considered under the "organ" prong, because it is relevant to determining "the degree to which an entity is performing a function 'on behalf of the foreign government.'" *USX*, 345 F.3d at 209. Similarly, a lack of immunity from lawsuits weighs against a finding of "organ" status. *Patrickson*, 251 F.3d at 808. At the very least, these factors indicate that an entity is not so intimately connected with the state itself that it is protected by the state's shield from lawsuits, or that the state manages its daily operations.

D. The Foreign-Relations Concerns of Amici and Powerex Are Properly Addressed to Congress, Not This Court

Powerex and amici warn that, unless the Ninth Circuit's decision is reversed, foreign governments will take great offense at being forced to defend themselves before state judges and juries, and adverse foreign-relations consequences will result. Pwx. Br. 36–38; BC Br. 22–24; Canada Br. 6–8, 11.

The "views" of a foreign state in a case such as this one may be relevant, but only insofar as they relate to how the foreign state treats its related entities. *E.g.*, *USX*, 345 F.3d at 207; *Kelly*, 213 F.3d at 847. This Court is not obliged to pay heed to Canada's or British Columbia's ***political*** concerns, or mere preferences, regarding American litigation against Canadian-related entities. While a foreign state can express its views about the impact of a litigation to the political branches, "it is quite a different matter to suggest that courts—state or federal—will tailor their rulings to accommodate the expressed interests of a foreign nation that is not even a party." *Patrickson*, 251 F.3d at 803. Canada and British Columbia should direct their concerns to Congress if they wish a broader definition of "organ" or the "ownership" prong. *See Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983) ("This Court has little competence in determining precisely when foreign nations will be offended by particular acts.").[32]

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[32] This Court should also decline amici's invitations to interpret the FSIA according to comity principles or other nations' interpretations of their own sovereign immunity laws. *See* Canada Br. 9–11; BC Br. 9–10. When it enacted the FSIA, Congress provided that sovereignty determinations "should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." 28 U.S.C. § 1602. Additionally, amici ignore that comity and other principles of international law are already subsumed into the substantive and procedural standards set forth in the FSIA. *See F. Hoffman-LaRoche*

Powerex further contends that the failure to recognize it as an organ of British Columbia, while according sovereign status to WAPA and BPA, violates article 1102 of the North American Free Trade Agreement. Pwx. Br. at 38–39; Pet. App. 147a. This argument incorrectly assumes that the lower courts had no rational basis for distinguishing Powerex from BPA and WAPA. In fact, these federal agencies are quite different from Powerex in their creation, structure and function. Both were formed by federal statutes that prescribe their function, both operate as a part of the Department of Energy, and both have Administrators who report directly to the Secretary of that Department. *See* 16 U.S.C. § 832a; 42 U.S.C. §§ 7152, 7275. Unlike Powerex, they are not profit-seeking entities, and are more similar to BC Hydro (indisputably, a sovereign entity) than to Powerex. *See generally* http://www.wapa.gov/about/default.htm; http://www.bpa.gov/corporate/About_BPA. Perhaps most significantly, in this litigation no one disputed the sovereign status of BPA or WAPA.

CONCLUSION

The judgment of the court of appeals should be vacated because that court lacked jurisdiction to review the district court's remand order. Alternatively, the judgment should be affirmed because Powerex is not an "organ" of British Columbia.

Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004) (courts "assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws"); *see also Verlinden*, 461 U.S. at 488–89; H.R. Rep. at 6–7, 10–13. Additionally, resort to foreign sources—assuming that is appropriate at all—is unnecessary here. This Court has available to it a wide variety of domestic sources from which to discern Congress' intended meaning of "organ." Finally, the authorities cited by amici are not helpful. They all concern whether or not to grant immunity, but that is not an issue here. *See* BC Br. 9–10; Canada Br. 10.

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APPENDIX

APPENDIX

CONSOLIDATED STATUTES OF BRITISH COLUMBIA

FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

Part 1—Introductory Provisions

R.S.B.C. 1996, c. 165

1. Definitions

Schedule 1 contains definitions of terms used in this Act.

2. Purposes of this Act

(1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by

(a) giving the public a right of access to records,

(b) giving individuals a right of access to, and a right to request correction of, personal information about themselves,

(c) specifying limited exceptions to the rights of access,

(d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and

(e) providing for an independent review of decisions made under this Act.

(2) This Act does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public.

3. Scope of this Act

(1) This Act applies to all records in the custody or under the control of a public body,

* * *

FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

Part 6—General Provisions

76. Power to make regulations

(1) The Lieutenant Governor in Council may make regulations referred to in section 41 of the Interpretation Act.

(2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations as follows:

* * *

(n) for any purpose contemplated by this Act.

(5) A regulation made under subsection (1) or (2) may provide differently for different classes of public bodies.

76.1 Ministerial regulation making power

(1) The minister responsible for this Act may, by regulation, amend Schedule 2 to do one or more of the following:

(a) add to it any agency, board, commission, corporation, office or other body

(i) of which any member is appointed by the Lieutenant Governor in Council or a minister,

(ii) of which a controlling interest in the share capital is owned by the government of British Columbia or any of its agencies, or

(iii) that performs functions under an enactment;

(b) designate or change the designation of the head of a public body;

(c) delete from it an agency, board, commission, corporation, office or other body that

(i) no longer exists, or

(ii) no longer meets the criteria established by paragraph (a)

* * *

FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

Schedule 1

(Note: see section 1)

Schedule 1

Definitions

In this Act:

* * *

"head", in relation to a public body, means

(a) if the public body is a ministry or office of the government of British Columbia, the member of the Executive Council who presides over it,

(b) if the public body is designated in, or added by regulation to, Schedule 2, the person designated as the head of that public body in that Schedule or by regulation,

* * *

"local government body" means

(a) a municipality

(b) REPEALED, SBC 2003 52 (a) effective January 1, 2004 (D.C. Reg. 465/2003)

(c) a regional district,

(d) an improvement district as defined in the Local Government Act,

(e) a local area as defined in the Local Services Act,

* * *

(m) a library board as defined in the Library Act,

(n) any board, committee, commission, panel, agency or corporation that is created or owned by a body referred to in paragraphs (a) to (m) and all the members or officers of

which are appointed or chosen by or under the authority of that body,

* * *

"local public body" means

(a) a local government body,

* * *

"minister responsible for this Act" means the member of the Executive Council charged by order of the Lieutenant Governor in Council with the administration of this Act;

* * *

"public body" means

(a) a ministry of the government of British Columbia,

(b) an agency, board, commission, corporation, office or other body designated in, or added by regulation to, Schedule 2, or

(c) a local public body

but does not include

(d) the office of a person who is a member or officer of the Legislative Assembly, or

(e) the Court of Appeal, Supreme Court or Provincial Court;

* * *

FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

Schedule 2

(Note: see Schedule 1, definitions of "head" and "public body")

Public Bodies

[Schedule 2]

* * *

Public Body:	British Columbia Hydro and Power Authority
Head:	Chair of the Board of Directors

* * *

Public Body:	Plumbing Code Advisory Committee
Head:	Minister of Community, Aboriginal and Women's Services Public
Body:	Power Engineers and Pressure Vessel Safety Advisory Committee
Head:	Minister of Community, Aboriginal and Women's Services Public
Body:	Power Engineers and Pressure Vessel Safety Appeal Board
Head:	Minister of Community, Aboriginal and Women's Services Public
Body:	Premier's Advisory Council for Persons with Disabilities
Head:	Minister of Education, Skills and Training Public
Body:	Premier's Advisory Council on Science and Technology
Head:	Minister of Advanced Education

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